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No. 85-1571

IN THE

Supreme Court of the United States

October Term, 1985

Jeffrey R. MacDonald,
Petitioner

v.

United States of America,
Respondent

REPLY BRIEF OF PETITIONER JEFFREY R. MACDONALD

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TABLE OF CONTENTS

Page

Reply Argument. 1

Recusal Issue..... 2

Use of Government Investigative Agent to Foreclose Petitioner's Psychiatric Defense..... 5

Withheld, Suppressed, and Destroyed Evidence..... 7

Conclusion. 9

TABLE OF AUTHORITIES

Cases:

Aetna Life Insurance Co. v. Lavoie, ___U.S.___ 106 S.Ct. 1580, 1585 (1986)..... 4

Ake v. Oklahoma, ___U.S.___, 105 S.Ct. 1087, 1095 (1985)..... 6

Jeffrey R. MacDonald, Petitioner v. United States of America, No. 82-565, *Cert. denied*, 459 U.S. 1103 (1983)..... 9

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)..... 4

Maine v. Moulton, ___U.S.___,106 S.Ct. 477, 487 (1985) ... 7

Massiah v. United States, 377 U.S. 204, 207 (1964). 6

Ward v. Village of Monroeville, 409 U.S. 60, 93 S.Ct. 57, 83 (1972)..... 5

Constitution and Statutes:

United Const. Amend. VI 6

28 U.S.C. § 144.....3, 4
28 U.S.C. § 455.....4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER JEFFREY R. MACDONALD

REPLY ARGUMENT

In light of intentional misstatements of fact contained in the Government's Brief in Opposition, Petitioner finds it necessary to file this response.

Throughout this case, the Government has willfully and deliberately misled the lower courts as to the true facts in this case, withheld evidence, and, by the response to the Petition for Writ of Certiorari to this Court, has exhibited a continuing willingness to do anything necessary to deny Petitioner a fair hearing.

1. THE RECUSAL ISSUE

The Government's allegation on page 9 of the Response that **"Proctor had no control over the investigation"** is a deliberate misstatement of fact and refuted directly by Government documents first obtained by Petitioner in 1983.

These documents, written by Proctor, acting under the color of his office as an Assistant United States Attorney on behalf of the United States Attorney for the Eastern District of North Carolina, clearly indicate that Proctor was the Assistant United States Attorney assigned to this case. He requested agents of the FBI to provide him with information in anticipation of presenting "this matter to a Grand Jury during the week of 9 November 1970."[1] In addition, Proctor sent further written requests for information to the Army on November 16, 1970. It is clear that Proctor was the assigned Assistant United States Attorney in this case, and that he was preparing this matter for trial.

Following the appointment of Judge Dupree on December 12, 1970, Proctor was shown to have met with Army investigators on December 30, 1970, and plotted with them to pressure the United States Attorney to indict Petitioner.[2] The statement on page 9 of the Government's Response that, **"Between the time of Judge Dupree's appointment and Proctor's resignation, no investigation of the MacDonald family murders was conducted by a grand jury, the United States Attorney's office, the Department of Justice, or the FBI,"** is also an intentional misstatement, directly contradicted by Government documents which were obtained by Petitioner in 1983.

This documentary proof was augmented by Proctor himself in public statements in which Proctor told the press that he was "going to Washington every two or three weeks, taking new evidence." He "talked to Victor Woerheide, Justice

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1 Letter dated November 2, 1970.

2 Transcript of telephone conversation of CID agents on December 31, 1070.

Department prosecutor, and convinced him that [he] had a case against MacDonald." [3]

Therefore, the statement that, **"Proctor resigned his position as an assistant United States Attorney on February 28, 1971, and thereafter had no connection with the case,"** directly conflicts with Proctor's public statements.

In direct contradiction to the Government's "factual" averments are (1) Proctor's statements to the Army investigators on December 30, 1970 that he was resigning the next day, and that he would surreptitiously aid them in convincing the United States Attorney to charge Petitioner; (2) the fact that Proctor actually remained in his position until February 28, 1971 (almost three months after the appointment of Judge Dupree); and (3) that Proctor told the media that, "We begged, pleaded, even threatened to resign," over the refusal of his superiors to bring a case against Petitioner.

In addition, the Government continues to withhold all of the files of the United States Attorney's office upon which Proctor had based his statement that he had prepared this case for trial, and also, the files of the FBI, Army CID, and Justice Department which would clearly detail Proctor's key role in this case.

The Government further wishes this Court to ignore the fact that although Proctor divorced Judge Dupree's daughter approximately two and a half years before the judge was assigned to the case, Proctor was still responsible for the support of the judge's grandchild.

If Proctor had, in fact, illegally provided copies of documents from the United States Attorney's office to the Army investigators as he promised to do on December 30, 1970, a full investigation might have serious ramifications for Mr. Proctor's reputation, name, and ability to support Judge Dupree's grandchild.

At no time did Petitioner limit his recusal motion. Judge Dupree, by refusing to permit another judge to hold an independent and full hearing on the Motion to Recuse as mandated by 28 U.S.C. § 144 denied Petitioner not only the

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[3] Petition for Writ of Certiorari, P. 15, n. 5.

ability to discover the full extent of Proctor's participation in this case, but also impartial factfinding as to the full extent of Judge Dupree's knowledge thereof. In effect, Judge Dupree placed his testimony upon the record, permitted no cross-examination of himself, and ruled on his own credibility and that of the father of his grandchild.

The Government's claim on page 12 of its response that, **"Proctor's involvement during this case therefore occurred well before Judge Dupree was appointed to the bench,"** again directly conflicts with documentary proof which was finally obtained by Petitioner from the Army in 1983 pursuant to numerous F.O.I.A. requests.

The Court of Appeals accepted Judge Dupree's self-serving fact finding without question and the Government expects this Court to ignore not only the documentary proof of Proctor's involvement in this case after the appointment of Judge Dupree, but also Judge Dupree's intentional disregard for the statutory mandates contained in 28 U.S.C. §§ 144 and 455.

Furthermore, the Government ignores the serious issue that neither Judge Dupree, Proctor, or any other representative of the Government disclosed to the defense Proctor's true role in this case when Judge Dupree was first assigned this matter in January of 1975, as mandated by 28 U.S.C. § 455.

This Court recently reaffirmed its concern with the issues raised by Petitioner in the case of *Aetna Life Insurance Co. v. Lavoie*, _____U.S._____, 106 S.Ct. 1580, 11585 (1986) wherein it stated:

> "More than 30 years ago, Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 624, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting, "Cannot be defined with precision."

Ibid. Nonetheless, a reasonable formulation of the issue is whether the

> "situation is one 'which would offer a possible temptation to the average judge to...lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S., ___, 60, 93 S.Ct. 57, 83 (1972)."

The continuing course of conduct by the Government in withholding and misstating evidence with regard to the recusal issue, combined with Judge Dupree's refusal to permit another judge to determine this issue, raise serious questions as to whether Petitioner even received a fair hearing on this issue, let alone a just result.

In addition, the few documents obtained by Petitioner thus far clearly show Proctor's responsibility for this case after the appointment of Judge Dupree while Proctor was married to the judge's daughter. It is also undisputed that Proctor was financially responsible for his child throughout the pendency of this case, and that Judge Dupree was the grandfather of Proctor's child.

It would be difficult to imagine a greater temptation to a judge than protecting the name and financial interest of his grandchild.

2. USE OF A GOVERNMENT INVESTIGATIVE AGENT TO FORECLOSE PETITIONER'S PSYCHIATRIC DEFENSE

The pattern which the Government established throughout this case of withholding key information from the defense prior to trial, using the fruits of their improper conduct to convict Petitioner, and then attempting to rationalize such conduct to this Court, is clearly shown by the Government's response to this issue.

There is no question that the defense was never informed prior to, or during, the trial that Dr. Brussel was, in fact, a criminologist who had been consulted by the Government in this case as early as February, 1971, and had formed a firm opinion as to Petitioner's guilt years before he

examined Petitioner during the trial.[4] This information was deliberately withheld from Petitioner by the Government. The trial court denied Petitioner access to the discovery material which would have revealed Dr. Brussel's true role in this matter and his predetermined conclusions about Petitioner.

By denying Petitioner access to this critical information concerning Dr. Brussel's status, Petitioner was not only denied an opportunity to object to the Government's use of Dr. Brussel, but also the opportunity to challenge his conclusions.

Since all of the Government psychiatric witnesses who had examined Petitioner for a full week at Walter Reed Army Hospital within months of the murders in 1970 had come to opposite conclusions of those of Dr. Brussel who "examined" Petitioner for 25 minutes nine years later, it is clear that the use of Dr. Brussel was the only way to guarantee foreclosure of the key psychiatric testimony for the defense.

The only conclusion that a fair-minded person could make was that the Government wilfully and intentionally used Brussel's sham examination to create a competing "psychiatric opinion" upon which the court relied to deny Petitioner the opportunity to present psychiatric evidence in his defense. This psychiatric testimony, including the prosecutor's experts, had been the linchpin in Dr. MacDonald's successful defense in the Article 32 proceedings.

This Court recognized "the pivotal role that psychiatry has come to play in criminal proceedings." *Ake v. Oklahoma*, ___U.S.___, 105 S.Ct. 1087, 1095 (1985). As the Court further noted: "[T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *id.* Furthermore, as in this case where mental state is an issue, "a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *id.*

Here, by the sham of a contrived psychiatric examination which was obtained by a fraud upon the defense and the court, the prosecutor gained an adversarial advantage from his intentional Sixth Amendment violation. *Massiah v. United States*, 377 U.S. 204, 207 (1964).

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[4] Petition for Writ of Certiorari, P. 18, n. 6.

As this Court stated in *Maine v. Moulton*, ___U.S.___, 106 S.Ct. 477, 484 (1985):

> "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State.....[t]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right...knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much of a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."

Here, the Government knowingly circumvented Dr. MacDonald's right to counsel by failing to disclose to Dr. MacDonald the facts of Brussel's earlier involvement and opinion. Disarmed by the Government's duplicity, Dr. MacDonald agreed to the uncounselled examination, as a result of which he was deprived of the right to present crucial psychiatric testimony in his defense.

The Government's conduct was the sort of "knowing exploitation of an opportunity to confront the accused without counsel being present" which was condemned and prohibited by this Court in *Maine v. Moulton*, *supra*.

The Government's knowing manipulation of the information necessary to Dr. MacDonald's exercise of his right to counsel was violative of his right to counsel.

3. WITHHELD, SUPPRESSED, AND DESTROYED EVIDENCE

A. Prior to trial, the Government intentionally withheld a report that one of the investigators at the crime scene had observed a half-filled syringe in the MacDonald home immediately following the murders. This information was not obtained by Petitioner until 1983. This evidence was critical to show not only the plausibility of Dr. MacDonald's version of an apparent drug-related gang committing the

murders, but would have seriously undermined the Government's arguments of a "scientifically" preserved crime scene which the jury had to accept in order to convict Petitioner.

B. All reports concerning the female boots, which were turned over to investigators by the landlord of one of the members of the Stoeckley group, were withheld from the defense prior to trial. The lower court concluded that since they were described by agents as beige in color, and Dr. MacDonald had described the boot he had seen while being attacked as brown, they did not fit the description given by Petitioner following the murders. Not only did the Government withhold the reports concerning the boots, but to this date there has never been any documentation from the Government as to what, if any, scientific tests were performed to determine if the boots could be linked to this crime.

C. Loss of human skin recovered from under the fingernail of Mrs. MacDonald: None of the doctors who examined Petitioner in the hospital following the murders noted any marks upon Dr. MacDonald's body which appeared to be human scratch marks. Nor did any of the criminal investigators of the Army or FBI make any report of any human scratches on MacDonald while he was in the hospital immediately after the incident. The Government's attempts to cover up their loss of potentially crucial evidence which might have exculpated Petitioner, and their subsequent withholding of the fact of that loss of evidence from the defense prior to trial, by saying, in effect, that since the Government lost it and Petitioner cannot prove it was exculpatory, he is not entitled to relief. The loss of the skin not only denied Petitioner the opportunity to prove through scientific testing that there were intruders in his house, but also to show the clear incompetence of the investigators in preserving important evidence.

D. Similarly, the cavalier attitude of the Government toward the withholding of notes of one of their agents that the painted letter "G" found on the wall of Helena Stoeckley's apartment resembled the "G" in the word "PIG" that had been written in blood on the headboard of the bed in the master bedroom. Not only was this fact withheld from the defense, but also the jury was thereby denied another fact which potentially linked Helena Stoeckley to the crime scene and supported Petitioner's version of events.

E. Perhaps the most important evidence withheld from the defense prior to trial was the extensive documentation verifying the reliability of Helena Stoeckley at the time she made admissions as to her involvement in this crime in 1970 and 1971. Dozens of pages of documents which were obtained by Petitioner in 1983 show clearly that Helena Stoeckley's statements were so trustworthy that they were used in many arrests and other police investigations. By withholding this important evidence from the lower court at the time of trial, the Government was able to convince the court that Helena Stoeckley was completely unreliable and her admissions with regard to this matter were withheld from the jury.

In the Government's Brief in Opposition to this Court, in 1982, opposing the Petition for Writ of Certiorari on this point, the Government cited testimony as to Stoeckley's unreliability by an agent, Brisentine, in an April 1971 report, while continuing to withhold from Petitioner and this Court the fact that dozens of pages of other investigators' reports from the same time period attested to her reliability an an "outstanding" police informant. Brief for the United States in Opposition, *Jeffrey R. MacDonald, Petitioner v. United States of America*, No. 82-565. *Cert. denied*, 459 U.S. 1103 (1983).

CONCLUSION

Not only has it been shown that the Government aggressively fought Petitioner prior to trial in his every attempt to obtain discovery in this case, but now a clear pattern of withholding potentially exculpatory evidence has become apparent.

The conduct of the Government denied Petitioner three of the major defenses he had to these heinous crimes.

First, by using Dr. Brussel's sham examination, Dr. MacDonald was denied crucial psychiatric testimony.

Secondly, by withholding evidence concerning the syringe, boots, the lost human skin found under the fingernail of Colette MacDonald, the similarities of the letter "G" found in the Stoeckley apartment and MacDonald home, and destruction of fingerprints, at the very least, Petitioner was denied the ability to show the incompetence of the

Government's hypothetical "scientific" analysis presented to the jury, and possibly the ability to prove the existence of intruders in the MacDonald home.

Thirdly, by withholding evidence of Stoeckley's reliability from both the Petitioner and the Courts, Petitioner was foreclosed from presenting to the jury the admissions of Stoeckley as to her involvement in these crimes.

In addition, at the time Judge Dupree was assigned to this case, the failure to disclose that the father of his grandchild had actively pushed for the indictment of Petitioner, demonstrates the clear pattern of intentional prosecutorial misconduct.

The Government virtually ignores the fact that Petitioner had presented after-discovered evidence through thirty-six new witnesses who identified the group originally described by Petitioner as being the murderers of his family. These witnesses offered evidence of a group of violent, drug abusing individuals who matched the description given by Petitioner immediately after the attack, and who had a motive for carrying out this attack. This group was seen going in the direction of the MacDonald residence immediately before the slayings and returning from the direction of the residence after the crimes were committed. Several of the individuals identified as being the attackers made numerous admissions as to their involvement in these crimes.

For this Court to ignore the deliberate violations of Petitioner's fundamental rights which have occurred in this case would grant license to prosecutors throughout the nation to act similarly.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 18, 1986, I served the within *Reply Brief of Petitioner* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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One First Street, N.W.
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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 18, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)